Supreme Court, U.S.
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No. 04-1074

In The
Supreme Court of the United States

GOVERNMENT OF GUAM
and EDNA T. PAULINO,

Petitioners,

v.

PACIFICARE HEALTH INSURANCE
COMPANY OF MICRONESIA, INC.
dba PACIFICARE ASIA PACIFIC,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Guam

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Guam Supreme Court committed error in finding that the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, permits arbitration of disputes not expressly identified or listed in the agreement to arbitrate.

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OPINIONS BELOW

Respondent adopts and incorporates Petitioners' statement in this regard, with the following addition. Subsequent to its Arbitral Award (Pet. App. 1d), the arbitration panel, on October 30, 2003, issued its Arbitral Award on Remand from the Superior Court. Resp. App. 1a.

STATEMENT OF THE CASE

Respondent PacifiCare Health Insurance Company of Micronesia, Inc. ("PacifiCare") was one of several insurance companies that contracted to provide health insurance coverage for Government of Guam ("Government")[1] employees and retirees. It is undisputed that the subject contract, known as the "Group Health Insurance Agreement/Health Services Agreement" ("Agreement"), contained a "broad" arbitration clause. *See* Pet. 9. A dispute arose between the parties concerning rates and benefits for the coming fiscal year and whether the "Continuing Clause" in the Agreement required PacifiCare to renew the Agreement for another year. Pet. App. 1d-2d. This dispute was presented to the duly appointed three-member arbitration panel. On October 1, 2003, a unanimous panel held that pursuant to Guam law and the Health Insurance Portability and Accountability Act ("HIPAA"), PacifiCare was relieved of any obligation to renew. Pet. App. 1d-2d.

On October 20, 2003, the Superior Court of Guam granted the Government's motion to vacate the award on

[1] References to the "Petitioners" or the "Government" in this brief refer collectively to Petitioners Government of Guam and Edna T. Paulino.

the grounds that it "did not draw its essence from the Agreement of the parties" and that "the arbitrators exceeded their authority and expressed manifest disregard for contract and common law." Pet. App. 36c. The Order remanded the matter to the arbitrators to determine appropriate medical benefits and rates between PacifiCare and the Government for Fiscal Year 2004.

The arbitrators' October 30, 2003 "Arbitration Award on Remand from the Superior Court" ("Award on Remand") complied with the Court's instruction that the Arbitrators renew the Agreement and set rates and benefits. Resp. App. 3a. However, the arbitrators also reiterated that they believed their original October 1, 2003 Award was a correct resolution of the matter. In fact, the arbitrators stated that they were not confident that a suitable rate structure was feasible in view of an actuarial "death spiral" plaguing the Government's health insurance program. As the panel stated, "[t]he [Government's] health plan benefits and the composition of the users presents perhaps an insolvable situation." Resp. App. 4a. A key portion of the Award on Remand reads as follows:

> The testimony and exhibits presented to the Panel on September 30th demonstrated beyond doubt (and without any contradiction by [the Government]) that to require PacifiCare to continue to provide health care benefits and rates anywhere near those charged in Fiscal Year 2003, would impose substantial financial losses on PacifiCare. Although [the Government] disputed, to some extent, that PacifiCare was in a 'death spiral', this panel finds that at the Fiscal Year 2003 rates, this was and is the case.

> The Superior Court was clear in expressing its concern about having rates and benefits so that PacifiCare could continue to provide [the Government] employees and retirees and still make a profit.
>
> However, at the crux of this matter is a crucial problem. [The Government's] health plan benefits and the composition of the users presents perhaps an insolvable situation. Pursuant to Exhibit 79, it is known that the number of . . . retirees in the plan has continued to increase. As expected, this class of users need and demand more care and hence more funding for their care. The Government of Guam at the hearing of this matter acknowledged the inherent problem with the existing plan.

Resp. App. 4a.

On September 17, 2004, the Supreme Court of Guam reversed the Superior Court's vacatur of the Arbitral Award, rejecting all of the lower court's grounds for vacatur and concluding, *inter alia*, that "a dispute concerning whether PacifiCare could be released from its obligations was a subject matter that was arbitrable under the parties' Agreement." Opinion at ¶34, Pet. App. 26a. The court rejected the lower court's arbitrability ruling because it was grounded on the incorrect determination that the parties had not reached an impasse on the issue of termination, which the Guam high court held was a question for the arbitrators. *Id.* at ¶36, Pet. App. 27a, *citing John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). The court's Opinion acknowledged that PacifiCare had also raised several additional grounds supporting the Arbitral Award, but found it "unnecessary

to address these arguments" in light of its holding. Opinion at ¶56, n. 11, Pet. App. 42a.

PacifiCare disagrees with Petitioners' Statement of the Case to the extent that it states or implies the sole basis advanced for termination of the subject Agreement was the mere failure to agree on rates for the upcoming term. In fact, as demonstrated by the Arbitral Award, the Award on Remand, and the Guam court decisions issued in this case, PacifiCare had sought termination on multiple alternative grounds, including the impracticability of setting effective rates, HIPAA, substantive provisions of Guam statutory law, and Guam case law which had earlier determined that health insurance agreements with the Government were terminable at will on the part of the health insurers.

Nevertheless, apart from the underlying merits, the parties unquestionably manifested an intention to submit disputes to an arbitration panel, and the finding of the Guam Supreme Court was a routine application of settled principles of law that does not raise any new, unique or novel issues for this Court to consider.

SUMMARY OF ARGUMENT

It is well settled that a broad arbitration clause (such as the one in this case) requires arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Tech., Inc. v. Communication Workers*, 475 U.S. 643, 650 (1986); *Steelworkers v. Warrior & Gulf Nav. Co*, 363 U.S. 574, 582-583 (1960). Reduced to its essence, the Government's Petition advocates the exact

opposite view – that no issue should be held arbitrable unless the agreement expressly enumerates the precise dispute in advance and states that it is arbitrable. Such a doctrine would constitute an abrupt retreat from over a half century of settled and consistent jurisprudence embodying a strong presumption in favor of arbitrability. Indeed, since the specific disputes that arise are generally not known in advance, the Government's position would largely render a prospective arbitration agreement an illusory and unenforceable promise. The Petition fails to show either that the Guam Supreme Court misstated the law or that this case is an appropriate vehicle for reexamining the law.

REASONS FOR DENYING THE PETITION

I.

THE GOVERNMENT HAS MISCHARACTERIZED BOTH THE CASE AND THE CONTROLLING LAW

A. Mischaracterization of the Case

Contrary to the Government's contentions, PacifiCare raised multiple grounds for terminating the Agreement both at the arbitration proceeding and before the Guam courts.[2] This is reflected in the October 1, 2003 Arbitral Award which, although brief, expressly referred to HIPAA and Guam case law germane to termination of Government health care agreements. Pet. App. 2d.

[2] The Guam Supreme Court acknowledged alternative grounds in its Opinion (Opinion at ¶56, n. 11, Pet. App. 42a), but found it "unnecessary to address these arguments" in light of its holding. *Id.*

Moreover, the October 30, 2003 Award on Remand manifested the arbitrators' concern over whether a suitable rate structure was even feasible. According to the arbitrators, the arbitration proceedings demonstrated "beyond doubt" the existence of an actuarial quagmire plaguing the Agreement at issue which the arbitrators dubbed "a crucial problem" and possibly "an insolvable situation." These facts are significant because, contrary to the Government's gloss on the matter, this was not an ordinary or routine situation in which parties simply failed to come to terms on rates.

The Government also neglected to mention that the "Arbitration Procedure" of the subject Agreement was expressly made subject to a decision of Guam's former Appellate Division court.[3] The case referred to in this provision of the Agreement is (unofficially) reported as *Government of Guam v. FHP, Inc.*, 1991 WL 275584 (D. Guam App. Div., Opinion, July 10, 1991) ("Appellate Division case"). That case had held, *inter alia*, that health insurers doing business with the Government, including PacifiCare's predecessor in interest, FHP, Inc., could terminate their agreements with the Government at the end of each term.[4]

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[3] Section 2 of the Arbitration Procedure reads as follows, in pertinent part: "The parties acknowledge that the revisions to the arbitration procedures made herein do not change the effect of the decision of the District Court of Guam Appellate Division in Civil Case No. 90-00014A on the Agreement."

[4] The Appellate Division had held that while the contracts were automatically renewable, they were subject to written consent. *Id.* at **7. As the court stated, " . . . the event triggering termination of the contracts is totally beyond the control of the plaintiff, [Government]. The 'event' is essentially the will of [health insurers] FHP and GMHPA to revoke the agreements." *Id.* at **8.

In addition to the express reference in the text of the subject Agreement, the Appellate Division case was also expressly mentioned in a Guam statute governing the Agreement. 4 G.C.A. §4301(g); Pet. 3.[5] Thus, both the Agreement and Guam statutory law command adherence to the Appellate Division case. Since that ruling expressly held that insurers could unilaterally terminate the agreements, the Government's bedrock contention that the subject Agreement only contemplated termination in the event of non-payment of premium is simply, and demonstrably, incorrect.

Although the arbitration clause at issue was extremely broad and encompassed "any dispute or controversy," the Superior Court vacated the arbitral award on the ground that the dispute was outside the scope of the arbitration agreement and, therefore, the arbitrators did not have the power to deny renewal of the Agreement. The Guam Supreme Court reversed this ruling, relying on a routine application of this Court's precedents in the area of arbitrability, and making no new, novel or unique findings of law. Thus, it can be seen that this case does not meet any of the standards for *certiorari* under this Court's rules. There is no split between the circuits on any important issue of law. There is not even a dispute over the meaning of any of this Court's precedents. Rather, at most, the Government contends that the Guam Supreme Court incorrectly concluded that the dispute between the parties was within the scope of the broad arbitration clause. This

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[5] The statute provides that, "[t]he Governor of Guam shall incorporate the continuing provision clause . . . which was the subject of the District Court of Guam Appellate Division Case, *Government of Guam v. FHP, Inc.*, (D. Guam App. Div. 1991), in the government's group health insurance agreement with any health insurance company. . . ."

is the kind of finding that courts make every day; and no novel or unique issues are raised. The Government is simply disappointed with the result, but points to no issues meriting *certiorari*.

B. Mischaracterization of the Law

Just as it mischaracterized the case, the Government also mischaracterized the current state of the law concerning the interpretation of contracts containing arbitration clauses. The Government quoted *Volt Information Sciences Inc. v. Bd. of Trustees, Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989), for the uncontroversial proposition that the FAA "'simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" Pet. 16. However, the Government neglected the remaining issues addressed in *Volt*. For example, the *Volt* court also reiterated that questions of arbitrability in contracts subject to the FAA must "'be addressed with a healthy regard for the federal policy favoring arbitration' and that 'any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration.'" *Id.*, 489 U.S. at 475, *quoting Moses H. Cohn Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). As this Court explained in *Volt*, "'as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.'" *Id.*, *quoting Mitsubishi Motors Inc. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Similarly, in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court observed that ambiguities in the language of the agreement should be resolved in favor of arbitration. *Id.* at 294. Nevertheless, the *Waffle House* decision recognized that a court may not reach "a result

inconsistent with the plain text of the contract simply because the policy favoring arbitration is implicated." *Id.* This latter concern does not and cannot mean that arbitration clauses must contain a list of every foreseeable issue that could arise under the contract. As shall be demonstrated below, neither *Waffle House* nor any other case from this Court supports the Government's position that the mere failure to mention a particular type of dispute precludes arbitrability. In any event, the most that could be said in this case is that the Government disagrees with the Guam Supreme Court's finding that the instant dispute comes within the scope of the arbitration clause – a routine determination that involves the application of settled principles of law.

II.

THE GUAM SUPREME COURT'S OPINION IS CONSISTENT WITH THIS COURT'S RULINGS

The Government has materially mischaracterized the holding of the court below. According to the Government, "[t]he opinion of the Supreme Court of Guam holds that, because of the unforeseeability of events which might cause a party to want to terminate a contract, it is only right, fair and just for the arbitrators to insert terms in the original contract not contemplated by the parties." Pet. 23. Of course, the Guam Supreme Court said nothing of the kind; and the Government conspicuously failed to point to any text of the Opinion allegedly containing such a holding.

In fact, what the Guam court held was that, based upon its examination of the law, the Agreement and, in particular, its broad arbitration clause, "[t]he question of whether PacifiCare was obligated to continue coverage or

could terminate coverage, was a subject matter which could be considered by the arbitrators *specifically because* termination was permitted under the Agreement and law applicable to the Agreement." Opinion ¶43, Pet. App. 33a (emphasis in the original). The court continued, "[i]t would be incongruous to conclude that by specifying instances where termination would be allowed, the parties necessarily intended to exclude from arbitration questions of termination which were not specified in the Agreement but otherwise arose out of the contract. The parties cannot be expected to anticipate every possible issue or dispute that could arise, or every possible remedy for a dispute." *Id.*

Nowhere in its Opinion did the Guam Supreme Court countenance "inserting terms in the original contract not contemplated by the parties." To the contrary, the court, in interpreting the Agreement, properly reviewed what the parties *had* contemplated; and it did no more than what courts regularly and properly do when determining whether an issue is arbitrable.

This Court's precedents plainly permit arbitration of issues not expressly discussed in an agreement. For example, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), this Court permitted an arbitration panel to award punitive damages although the arbitration agreement was silent regarding punitive damages. Likewise, in *John Wiley*, this Court found that a corporate employer was bound to arbitrate an issue pursuant to an agreement between the union and another company with which the employer had merged, notwithstanding the Court's observation that "[i]n all probability, the situation created by the merger was one not expressly contemplated . . . when the agreement was made in 1960." *Id.*, 376 U.S. at 554.

Finally, this principle was recently confirmed by this Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), where the Court instructed lower courts to evaluate only the "gateway" issues in deciding arbitrability (*i.e.*, did the parties agree to arbitrate, is the dispute within the scope of that agreement, and is the agreement enforceable?). This is precisely what the Guam Supreme Court did in this case.

The Government cannot manufacture a novel legal issue by the artifice of mischaracterizing the Guam Supreme Court's holding. In fact, the Government has not pointed to any part of the Guam Supreme Court's Opinion which allegedly "contravenes relevant decisions of [this] Court" or "deviated from federal precedents." (Pet. 11, 12, respectively.) Thus, *certiorari* review is not warranted under Supreme Court Rule 10(c).

The Rules of this Court clearly explain that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The instant petition is nothing more than a claim of error by the Guam Supreme Court. Here, the trial court's vacatur was reversed by the Guam Supreme Court not because of the application of incorrect standards, but rather, because of a routine determination of arbitrability. The issue of whether the Guam Supreme Court erroneously *applied* the law in deciding the arbitrability question is not relevant to a determination of *certiorari* under this Court's rules.

III.

THE QUESTION RAISED BY THE GOVERNMENT NOW WAS NOT PRESSED OR PASSED UPON BELOW

Earlier this term, the Court observed that, ". . .this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, ___ U.S. ___, 125 S. Ct. 856, 858 (2005) (*per curiam*), *quoting Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*). *Certiorari* should not be granted where the state supreme court did not expressly address the question for which *certiorari* is sought and the petitioner does not meet its burden of showing that the issue was properly presented to that court. *See Adams*, 520 U.S. at 86.

The Government concedes that it did not raise below the precise question presented in its *certiorari* petition. Pet. 15. Indeed, neither the Government's briefs nor the Guam Supreme Court's Opinion addressed the question of whether issues must be specifically listed in a contract in order to be arbitrable. The parties and the Court instead focused on a host of other issues involving the circumstances when an arbitral award may be vacated.

The Government's reliance upon *Illinois v. Gates*, 462 U.S. 213, 220 (1983), is misplaced. In *Gates*, this Court reaffirmed the rule against deciding claims "not pressed or passed upon" in state court. 462 U.S. at 219. In declining to consider an issue relating to the exclusionary rule based upon the "not pressed or passed upon" rule, the *Gates*

court observed that "although the Illinois courts applied the federal exclusionary rule, there was never 'any real contest' on the point." *Id.* at 223; *quoting Morrison v. Watson*, 154 U.S. 111, 115 (1894).

Likewise, in the instant case, there was never "any real contest" on the point the Government now presses. Here, the broad arbitration clause provided for arbitration of any dispute or controversy arising under the contract, but it did not specifically state that termination for failure to reach agreement on rates was arbitrable. The Guam courts applied the general rule that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (Opinion ¶24, Pet. App. 20a), but the Court was not asked to address and did not address whether the absence of a list of specific disputes that would be arbitrable is fatal to enforcement of an arbitration clause. The Government never argued such a point; and the Guam courts had no occasion to analyze it.

As the Government implicitly acknowledges (*see* Pet. 15), neither the majority nor the dissent in the Guam Supreme Court Opinion addressed whether the policy requiring strict enforcement of an agreement to arbitrate equates "silence" with inarbitrability.[6] In short, the Guam Supreme Court simply did not reach the issue now advanced by the Government. Accordingly, *certiorari* review

[6] While Guam Supreme Court Associate Justice Torres' dissenting opinion maintained that, in his view, the parties did not intend to arbitrate the issue of termination, he reached this conclusion only after undertaking a detailed analysis of the Agreement as a whole, spanning some ten paragraphs in his dissenting opinion. Opinion (Dissent), Pet. App. 47a-56a. No such extended discussion would have been necessary if Justice Torres had concluded that the mere absence of express language on the matter was a sufficient ground for holding the issue inarbitrable.

is not justified by Rule 10(c), because it cannot be said that a state court, in this instance, "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided [it] . . . in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

IV.

THIS CASE IS NOT THE PROPER VEHICLE FOR REVIEW OF ISSUES RAISED IN *GREEN TREE*

The Government seizes upon the opinions issued by members of this Court in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and then makes an ungainly attempt to fit the instant case within the parameters of *Green Tree*. The Government has failed to show that the instant case presents an appropriate vehicle for review of questions raised in *Green Tree*. First, *Green Tree* did not leave unresolved the question of whether silence makes an issue inarbitrable. That issue was simply not addressed in *Green Tree*. Second, the Guam courts did not and could not reach that question either, inasmuch as the contract at issue was not "silent" as to the issue of termination.

A. The Dissent in *Green Tree* Did Not Advocate the Rule the Government Proposes

The Government maintains that the instant case presents an appropriate vehicle for resolving an issue supposedly left unanswered in *Green Tree*; to wit, whether the FAA allows arbitrators, under a broad arbitration clause, to enforce an arbitration clause in the absence of an express list of the specific issues to be arbitrated.

However, this argument hinges on a faulty interpretation of *Green Tree*.

According to the Government, "[t]hree justices of this Court, in a dissenting opinion in *Green Tree* . . . found that the FAA requires an arbitration agreement to be strictly enforced according to its terms if the agreement is 'silent' as to the matters on controversy." Pet. 10. This characterization is incorrect. Although the *Green Tree* dissent stressed the principle of enforcing agreements to arbitrate according to their terms, 539 U.S. at 458, the thrust of the dissent was the assertion that class-action arbitration was contrary to an express provision of the agreement to arbitrate that required the petitioner and each buyer agree to a particular arbitrator for disputes between petitioner and that specific buyer. *Id.* at 459.

It was not the absence of specific language in the contract that troubled the dissent, it was a perceived conflict between the contract's *existing* language and the result reached by the South Carolina Supreme Court.[7] In fact, neither the dissent nor any of the opinions filed in *Green Tree* advanced, or even discussed, any *per se* rule, urged by the Government here, that would render issues not expressly listed in an agreement inarbitrable.

In the case *sub judice,* the Government does not maintain that the Guam Supreme Court's ruling contravened any *express* provision of the contract. In fact, the

[7] The dissent observed that the imposition of class-wide arbitration "contravenes the just-quoted provision about the selection of an arbitrator." *Id.* As the dissent put it, "[h]ere, the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator should be chosen." *Id.*

Government essentially concedes this point in the final paragraph of its petition by the manner it which it characterized the Guam Supreme Court's Opinion. *See* Pet. 24 ("This Opinion holds that various terms may be added to the parties' agreement to arbitrate so long as those procedures do not *directly conflict* with the arbitration agreement.") (emphasis in the original).

Instead, the Government merely urges adoption of a novel rule, apparently never embraced by any reported court decision, that would deny arbitration as to any issue not expressly set forth in an agreement to arbitrate. The Government has failed to show that any such rule is either necessary or desirable. Neither has the Government attempted to harmonize such a rigid *per se* rule with the well-settled judicial "presumption of arbitrability" embodied in the FAA. *See Warrior & Gulf*, 363 U.S. at 582-583.

This Court has never retreated from the rule that doubts about arbitrability should be resolved in favor of coverage. *See Mitsubishi*, 473 U.S. at 626. Neither has the Court backed away from the conclusion that where an agreement contains a broad arbitration clause, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think that only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf*, 363 U.S. at 583; *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 380 (1974). The Government has given the Court no reason to revisit such well-settled principles now.

B. This Case is Fundamentally Distinguishable from *Green Tree*

The Government has failed to show any justification for granting *certiorari* in the case *sub judice* based upon *Green Tree*. First, this case does not involve class action arbitrations at all. Thus, this case cannot possibly shed light on that subject. Second, the Government has not cited any "unsettled" legal point at issue in this case on which this Court has not already spoken.[8] Third, because the law is in fact so well settled on this point, the Government has failed to show any "recurring issue" concerning the matter which would warrant this Court's review.[9]

Moreover, even if the Government had advanced sound reasons for coining a new rule governing arbitrability, it has failed to demonstrate that this is the proper case for advancement of such a rule. This case is fundamentally distinguishable from *Green Tree*. In *Green Tree*, the subject agreement was completely *silent* on the key subject of class action arbitration. In contrast, as the Guam Supreme Court observed, the Agreement at issue in this case made express mention of "termination" in several respects. Pet. App. 32a. In addition, the termination issue was thoroughly addressed by the Appellate Division case, which

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[8] In contrast, the fact that *certiorari* was granted in *Green Tree* is understandable. As the South Carolina Supreme Court observed, this Court had not yet addressed the FAA's impact on class-wide arbitration, and courts that had addressed the issue had taken two different approaches. *See Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 257, 569 S.E. 2d 349 (S.C. 2002).

[9] As indicated, this Court has regularly reiterated that " . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 476.

was embodied both in the Agreement as well as in the Guam statute that governed the Agreement.

While there is room for argument as to what events might justify termination under the Agreement, there is no room for debate over the fact that "termination" was discussed in the Agreement and the applicable law. Given this key factual distinction, the Government has simply failed to set forth any principled basis for *certiorari* review of this case on the strength of *Green Tree*. There is simply no "unsettled" question of federal law which consideration of this case would resolve.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Government's petition should be denied.

Dated this 10th day of March, 2005.

Respectfully submitted,

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IN THE TERRITORY OF GUAM
ARBITRATION PROCEEDING

PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC.	)	
Claimant,	)	**ARBITRATION AWARD ON REMAND FROM THE SUPERIOR COURT**
vs.	)	
GOVERNMENT OF GUAM,	)	
Respondent.	)	

On October 20, 2003, the Superior Court of Guam remanded this matter to the Arbitration Panel with instructions " . . . to arbitrate appropriate medical benefits and rates between Pacificare and GovGuam for Fiscal Year 2004". The Court also requested this panel to conclude arbitration and announce the decision by October 28, 2003.

A logistical problem presented itself as only one arbitrator is in the Mariana Islands. However, extensive telephonic and facsimile transmissions have been utilized so that the panel can consider and comply with the remand of the Superior Court within the time frame set forth by the Court.

The panel is also in receipt of Pacificare's "Supplemental memorandum on Remand to Arbitrators".[1]

[1] Pacificare essentially makes two points. First, it reserves its right to contest the propriety of the Court's decision and order of October 20,

(Continued on following page)

The Government of Guam has filed with the panel a "Request For Scheduling Order". In that document, the Government states that a " . . . further hearing is both appropriate and necessary to complete arbitration regarding rates and benefits."

The Government also sets forth several requests on how to proceed with a Further Hearing.[2] In essence, the requests amount to a restart of the whole proceedings, including discovery, response to discovery requests, scheduling of a new hearing, along with pre-hearing memoranda and exchange of witness lists.

The Superior Court, the parties and this panel are all desirous of one result – a health plan for GovGuam employees and retirees which, in the words of the Superior Court, " . . . Pacificare can feasibly offer to GovGuam to remain a viable business enterprise in the wake of its contractual relationship with the government of Guam." Clearly, it does no one any good to force Pacificare into bankruptcy.

2003: second, it asserts that no further hearing is required as the panel already has evidence on rates and benefits for Fiscal Year 2004.

[2] Anticipating the logistical problems noted above, GovGuam requests, in essence, that this panel abdicate in favor of substitute arbitrators selected by this panel or have this panel "appoint a master to review the proposed rates and benefits so that he or she (the master) can assist the arbitrators in determining fair rates and benefits". This panel declines to opt for either of these paths for several reasons. A great amount of time and expense has already been spent on this matter. The parties, as well as the Superior Court, are cognizant of the narrow time frame in which this matter needs to be resolved. Further, it is very doubtful if this panel has the authority or power to appoint substitutes or a master. It is clear the Superior Court intended this panel to complete this matter and this panel will not avoid that responsibility.

A misconception of sorts by the Superior Court is gleaned by this panel as to the scope of the hearing held in September. On Page 27 of its opinion, the Court stated: "The parties' dispute regarding medical benefits and rates was never presented to the arbitrators for resolution.["]

Indeed, a great deal of the testimony and the exhibits offered went to this very issue. The panel, in its original award, did not proceed to consider this evidence as it found that to do so was not necessary for the reasons stated in its decision of October 1, 2003.

In light of the remand of the Superior Court, the panel accepts the responsibility imposed upon it by the parties pursuant to their arbitration agreement and as requested by the Superior Court.[3]

The testimony and exhibits presented to the panel on September 30th demonstrated beyond doubt (and without any contradiction by GovGuam) that to require Pacificare to continue to provide health care benefits and rates anywhere near those charged in Fiscal Year 2003, would impose substantial financial losses on Pacificare. Although GovGuam disputed, to some extent, that Pacificare was in a "death spiral", this panel finds that at the Fiscal Year 2003 rates, this was and is the case.[4]

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[3] Pursuant to the arbitration agreement and according to standard arbitration procedures, arbitration awards are usually terse and absent an opinion-like format. Since this matter has taken on a somewhat different structure, this panel has opted to be more verbose in stating this award on remand.

[4] Essentially, a "death spiral" results when the composition of the patients (users) of the health plan and the benefits provided cause the health provider to raise rates to meet expenses. This causes the users of the plan who are healthier or are not in need of the higher priced health

(Continued on following page)

The Superior Court was clear in expressing its concern about having rates and benefits so that Pacificare could continue to provide GovGuam employees and retirees and still make a profit.

However, at the crux of this matter is a crucial problem. The GovGuam health plan benefits and the composition of the users presents perhaps an insolvable situation. Pursuant to Exhibit 79, it is known that the number of GovGuam retirees in the plan has continued to increase. As expected, this class of users need and demand more care and hence more funding for their care. The Government of Guam at the hearing of this matter acknowledged the inherent problem with the existing plan.

Nonetheless, this panel will strive to comply with the remand of the Superior Court although there is no assurance the rates and benefits award[ed] herein will: (1) Provide Pacificare with reasonable profit of 5% – a goal which at least presently has not been attained; (2) Provide GovGuam employees and retirees with a health plan at rates and benefits which they are willing (and able) to pay.

Pacificare presented evidence and exhibits setting forth its proposals for the health plan for Fiscal Year 2004. The Government of Guam declined to accept any of the proposals and it is not clear to this panel exactly what is acceptable to it – other than rates and benefits close to those provided in Fiscal Year 2003. To comply with the mandate of the Superior Court and to be as specific as

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plan to withdraw from the plan. This leaves the users who need more health care in the plan which drives up the costs even more. The cycle is repeated until the health provider raises the premiums so high everyone opts out and the health care provider is financially ruined.

possibly and to bring this matter to a conclusion the panel must and shall rely on the evidence and exhibits presented at the September 30th hearing. Accordingly the award of this panel is as follows:

AWARD ON REMAND

The Fiscal Year 2004 rates for the GovGuam – Pacificare health plan shall be:

1. $750 deductible
2. Medical: Class I at $913.70 per month.
   Class II and III at $2,732.34 per month.
3. Dental: Class I at $39.42 per month
   Class II and III at $105.77 per month

The benefits are those set forth in Pacificare's Exhibit 42 (attached hereto).

Dated: 10/27/03 /s/ Robert A. Hefner
ROBERT A. HEFNER
Arbitrator

Dated: 10/30/03 /s/ William M. Fitzgerald
WILLIAM M. FITZGERALD
Arbitrator

Dated: 10/30/03 /s/ G.W.F. Gumataotao
G.W.F. GUMATAOTAO
Arbitrator